

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 40

WCC No. 2010-2598

GINGER DOSTAL

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent.

ORDER GRANTING RESPONDENT'S MOTION FOR RECONSIDERATION AND
FINDING RESPONDENT'S REFUSAL TO PAY PETITIONER'S IMPAIRMENT
AWARDS UNREASONABLE

Summary: Respondent moved for reconsideration of the Court's Findings of Fact, Conclusions of Law and Judgment, contending that the Court erred in failing to make findings and conclusions consistent with its previous oral ruling regarding Petitioner's entitlement to payment of her impairment awards. Petitioner concurred in Respondent's request and further asked the Court to make findings regarding whether Respondent unreasonably refused to pay her impairment awards.

Held: Respondent's motion for reconsideration is well-taken. The Court overlooked its previous ruling regarding Petitioner's impairment awards when it published its Findings of Fact, Conclusions of Law and Judgment, and the parties are entitled to a written order setting forth the Court's rationale. The Court's findings and conclusions regarding its oral ruling are set forth. Furthermore, the Court found Respondent's refusal to pay Petitioner's impairment awards to be unreasonable.

Topics:

Summary Judgment: Disputed Facts. Where a disputed fact is immaterial to the legal issue raised in a motion for summary judgment, the existence of this disputed fact does not preclude summary judgment.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-737. Under § 39-71-737, MCA (1991), the statute

included language which excepted impairment awards from the classes of benefits which could not be paid concurrently. Therefore, in a claim under the 1991 statutes, cases which interpreted an older version of the statute which did not include this exception are not pertinent to the present case and will not preclude Petitioner from receiving an impairment award concurrent with other benefits.

Statutes and Statutory Interpretation: Applicable Law. Under § 39-71-737, MCA (1991), the statute included language which excepted impairment awards from the classes of benefits which could not be paid concurrently. Therefore, in a claim under the 1991 statutes, cases which interpreted an older version of the statute which did not include this exception are not pertinent to the present case and will not preclude Petitioner from receiving an impairment award concurrent with other benefits.

Uninsured Employers' Fund: Reasonableness of Claims Handling. The UEF unreasonably refused to pay Petitioner's impairment award where the UEF's argument was, essentially, that although no justifiable reason existed at the time of its refusal to pay Petitioner's impairment award, future events could provide it with a justifiable reason for refusing to pay.

¶ 1 On February 16, 2012, I entered my Findings of Fact, Conclusions of Law and Judgment in this matter.¹ On February 24, 2012, Respondent Uninsured Employers' Fund (UEF) moved for reconsideration. The UEF noted that in my Conclusions of Law, I did not make findings of fact and conclusions of law setting forth my reasoning for a previous oral ruling I made in which I held that Petitioner Ginger Dostal was entitled to payment for impairment ratings she received for a right fibular fracture (3%) and cervical spine (1%).² In moving for reconsideration, the UEF draws the Court's attention to an earlier proceeding in which I granted Dostal summary judgment on the issue of payment of these impairment awards.³ The UEF notes that while I reiterated the ruling in my conclusions of law, I did not set forth any findings or rationale for the holding. The UEF

¹ *Dostal v. Uninsured Employers' Fund*, 2012 MTWCC 5.

² Uninsured Employers' Fund's Motion for Reconsideration Regarding Payment of Impairment Awards (Motion for Reconsideration), Docket Item No. 91, at 2. Except as otherwise noted, all references to impairment ratings or impairment awards within this Order refer to Dostal's 3% impairment rating for a right fibular fracture and 1% impairment rating for her cervical condition.

³ Motion for Reconsideration at 2; See Minute Book Hearing No. 4263, Docket Item No. 64.

asks that I make findings and provide my rationale for the ruling in order to maintain a clean record.⁴

¶ 2 Dostal responded to the UEF's motion for reconsideration, stating that she agrees that the Court should have included its rationale for awarding her payment of her impairment awards in the decision.⁵ Dostal summarized my April 12, 2011, oral ruling as follows:

[T]he Court held that Petitioner was entitled to impairment awards for the right fibula fracture and cervical spine injury since it is uncontroverted that she was at MMI as of January 21, 2003, when Dr. Rosen determined the impairments. The Court reasoned that, despite UEF's argument to the contrary, § 39-71-737, MCA (1991)[,] allows impairment awards to be paid concurrently with other classes of benefits. The Court reserved ruling upon whether the UEF was required to **pay** the impairments until it determined whether Petitioner had been overpaid TTD benefits.⁶

¶ 3 Dostal further asks the Court to find that the UEF was unreasonable when it refused to pay her impairment awards in 2003. Dostal notes that the issue regarding an alleged overpayment of her TTD benefits did not arise until 2010 – approximately seven years after the UEF refused to pay her impairment awards.⁷

¶ 4 I advised the parties that I intended to grant the UEF's motion for reconsideration but reserve ruling on the reasonableness issue until I heard oral argument on the issue of the UEF's liability for penalties and attorneys' fees.⁸ Having heard those arguments, I will address the reasonableness issue within this Order.

Dostal's Entitlement to Impairment Awards

¶ 5 In her Petition for Trial, Dostal contended that on January 21, 2003, Dr. Bill Rosen assigned her a 3% impairment rating for her right fibular fracture and 1% for her cervical spine, but the UEF has not paid these impairment awards.⁹

⁴ Motion for Reconsideration at 2.

⁵ Petitioner's Memorandum Regarding UEF's Motion for Reconsideration (Petitioner's Memorandum), Docket Item No. 93.

⁶ Petitioner's Memorandum at 1-2. (Emphasis in original.)

⁷ Petitioner's Memorandum at 2.

⁸ E-Mail Correspondence From Court to Counsel, Docket Item No. 95.

⁹ Petition for Trial, Docket Item No. 1, at 3.

¶ 6 The UEF admitted in part and denied in part Dostal's contention, alleging that the correct date of the report containing the impairment ratings at issue was January 6, 2003, and further stating:

The UEF also contends that the full panel report assessed a 5% impairment for the lumbar spine, 3% impairment rating for the right fibular fracture, and a 1% impairment rating for the cervical spine in addition to impairments previously assessed, leaving a whole person impairment of 12%.

. . . [T]he UEF denies that none of Petitioner's 12% impairment has ever been paid and contends that the UEF has paid Petitioner PPD for her 5% impairment for the lumbar spine and 3% impairment of her left ankle (sic). The UEF further contends that at the time of the January 2003 IME assessment, Petitioner was not at MMI for her low back and was receiving TTD, and therefore, the UEF could not tender payment for the remaining impairments of 3% for right fibular fracture and 1% for the cervical spine. The UEF also contends now that Petitioner has reached MMI, but owes the UEF an overpayment, payment of the remaining 4% impairment is not due until the court determines the overpayment based on Petitioner's actual return to work date.¹⁰

¶ 7 On January 10, 2011, Dostal moved for partial summary judgment on three issues, including her entitlement to payment of her impairment awards.¹¹ Noting the UEF's response to her petition, noted above, Dostal further set forth pertinent discovery responses as follows:

DISCOVERY REQUEST NO. 112: State the factual and legal basis for your failure or refusal to pay at any time prior to 2010, the 1% impairment issued on or about January 21, 2003, by Dr. Bill Rosen relating to Petitioner's cervical spine.

UEF Supplemental Response: At the time of the January 21, 2003[,] impairment evaluation, Petitioner was not at MMI for all conditions related to her industrial injury and therefore, under section 39-71-703, MCA (1991)[,] she was not yet entitled to compensation for permanent partial disability.

¹⁰ Uninsured Employers' Fund's Response to Petition for Hearing, Docket Item No. 4, ¶¶ 12-13.

¹¹ Petitioner's Motion for Partial Summary Judgment and Memorandum in Support (Opening Brief), Docket Item No. 25.

DISCOVERY REQUEST NO. 113: State the factual and legal basis for your failure or refusal to pay at any time prior to 2010, the 3% impairment issued on or about January 21, 2003, by Dr. Bill Rosen relating to Petitioner's right fibular fracture.

UEF Supplemental Response: At the time of the January 21, 2003[,] impairment evaluation Petitioner was not at MMI for all conditions related to her industrial injury and therefore, under section 39-71-703, MCA (1991)[,] she was not yet entitled to compensation for permanent partial disability.¹²

¶ 8 Dostal asserts that the UEF has provided her with two separate justifications for its failure to pay her the two impairment awards at issue: first, that it could not pay her impairment awards because she was not at maximum medical improvement (MMI) for her low back and was receiving TTD benefits; and second, because she had returned to work and therefore owed the UEF some unknown amount of overpayment. With respect to the first justification, Dostal argues that the UEF's argument is unfounded because payment of her impairment awards concomitant with receiving TTD benefits was permitted under the applicable statute. Dostal cites to § 39-71-737, MCA (1991), which provides:

Compensation shall run consecutively and not concurrently, and payment shall not be made for two classes of disability over the same period ***except that impairment awards and auxiliary rehabilitation benefits may be paid concurrently with other classes of benefits***, and wage supplement and partial rehabilitation benefits may be paid concurrently.¹³

¶ 9 Dostal argues that the clear language of the statute obviates the UEF's contention that it could not pay her these impairment awards prior to her low back reaching MMI.¹⁴ As to the UEF's second justification, Dostal points out that her impairment awards were payable in 2003, and the UEF did not come to believe that she may have been working until several years later, thus this was clearly not a justification for refusing to pay the impairment awards at the time Dr. Rosen assigned her the ratings. Dostal further argues that nothing in the Workers' Compensation Act (WCA) would have allowed the UEF to withhold an impairment award because it believed it overpaid other benefits. To the contrary, Dostal argues, § 39-71-743, MCA (1991),

¹² Opening Brief at 4.

¹³ Emphasis added.

¹⁴ Opening Brief at 6.

provides that payments under the WCA shall not “be held liable in any way for debts” except for a few specific instances not applicable here.¹⁵

¶ 10 The UEF responded to Dostal's motion for partial summary judgment and cross-motivated on the same issues.¹⁶ The UEF argued that Dostal's motion for partial summary judgment on her entitlement to payment of her impairment awards should be denied because material facts regarding this issue remain in dispute.¹⁷ In particular, the UEF disagreed with Dostal's statement that she had not returned to work.¹⁸ The UEF further contended:

The UEF disputes that section 39-71-737, MCA (1991)[,] supports that Petitioner was entitled to payment of an impairment award while concurrently receiving temporary total disability benefits. The UEF further disputes that section 39-71-743, MCA (1991)[,] supports that Petitioner is entitled to payment of an impairment award when there is a dispute as to whether Petitioner owes the UEF an overpayment.¹⁹

¶ 11 For purposes of resolving the issue of Dostal's entitlement to payment of her impairment awards for which she received a rating in 2003, it is immaterial whether she may or may not have returned to work several years later. Therefore, this disputed fact does not preclude summary judgment on this issue. As to the UEF's argument that facts are in dispute because the UEF and Dostal disagree as to the applicability of certain statutes, the application of a statute is by definition a legal – not a factual – dispute; it is therefore not a bar to summary disposition of this issue.

¶ 12 The UEF argues that Dostal was not entitled to payment of her impairment awards at the time Dr. Rosen assigned ratings for her right fibula and cervical spine because she was not at MMI from her industrial injury. However, as I noted at the time of my oral ruling, the UEF presented no evidence to controvert Dr. Rosen's report in which he stated that Dostal was at MMI and assessed her impairment ratings for her right fibular fracture and cervical spine injury.²⁰ With no evidence to support its statement, I find the UEF has no basis for this allegation.

¹⁵ Opening Brief at 6-7.

¹⁶ Response to Petitioner's Motion for Partial Summary Judgment and Uninsured Employers' Fund's Cross Motion for Partial Summary Judgment and Brief in Support Thereof (Response Brief), Docket Item No. 28.

¹⁷ Response Brief at 5.

¹⁸ Response Brief at 2.

¹⁹ Response Brief at 2.

²⁰ See Minute Book Hearing No. 4263.

¶ 13 The UEF disagrees with Dostal's contention that § 39-71-737, MCA (1991), permits the payment of these impairment awards while Dostal continued to receive TTD benefits.²¹ In support of its position, the UEF cites *Dosen v. E. Butte Copper Mining Co.*, in which the Montana Supreme Court specified that "classes of disability" under the statute consisted of temporary total, temporary partial, permanent total, and permanent partial disabilities, and held that benefits for these disabilities could not run concurrently under the applicable statutes.²² The UEF alleges that while *Dosen* "is old, it has not been overturned," and therefore the UEF argues that this Court should rely on *Dosen* and deny Dostal's request for payment of her impairment awards while she continues to receive TTD benefits for other injuries.²³ The UEF further argues that in *Grimshaw v. L. Peter Larson Co.*, the Montana Supreme Court held that § 39-71-737, MCA, prevents the concurrent payment of benefits under Part 7 of the WCA,²⁴ and that *Grimshaw* likewise supports its position.²⁵

¶ 14 *Dosen* interpreted Section 2919, 1925 Mont. Laws 210, which states, in pertinent part:

Compensation other than medical, surgical, hospital and burial benefits provided shall run consecutively and not concurrently and payment shall not be made for two classes of disability over the same period.

¶ 15 *Grimshaw* interpreted § 39-71-737, MCA (1979), which states: "Compensation shall run consecutively and not concurrently, and payment shall not be made for two classes of disability over the same period."

¶ 16 Dostal's claim, however, falls under § 39-71-737, MCA (1991), which states:

Compensation shall run consecutively and not concurrently, and payment shall not be made for two classes of disability over the same period ***except that impairment awards and auxiliary rehabilitation benefits may be paid concurrently with other classes of benefits, and wage***

²¹ Response Brief at 5-6.

²² *Dosen*, 78 Mont. 579, 600-602, 254 P. 880, 886-87 (1927) (overruled on other grounds by *Small v. Combustion Eng'g*, 209 Mont. 387, 681 P.2d 1081 (1984)).

²³ Response Brief at 5-6.

²⁴ *Grimshaw*, 213 Mont. 291, 691 P.2d 805 (1984).

²⁵ Response Brief at 5-6.

supplement and partial rehabilitation benefits may be paid concurrently.²⁶

¶ 17 The UEF's argument that *Dosen* and *Grimshaw* – which interpret a predecessor to, and a previous version of, § 39-71-737, MCA, respectively – should control the present case when the statute at issue was amended to permit exactly the situation here is wholly devoid of merit. I therefore conclude Dostal is entitled to payment of her impairment awards, consistent with my ruling in 2012 MTWCC 5.²⁷

Whether the UEF's Refusal to Pay Dostal's Impairment Awards Was Unreasonable

¶ 18 While I have concluded the UEF is liable for payment of the impairment awards Dostal received for her right fibular fracture and cervical spine, Dostal further asks the Court to find that the UEF's refusal to pay the awards was unreasonable.

¶ 19 In addition to arguing that it was entitled to refuse to pay Dostal her impairment awards by relying on cases which interpreted previous versions of the applicable statute which conveniently omitted the very language which permitted the payment of an impairment award in cases such as Dostal's, the UEF argues that it was justified in refusing to pay Dostal's impairment awards because it believed that she may have returned to work while continuing to receive TTD benefits, thus potentially entitling the UEF to recoup an overpayment. However, Dostal received her impairment ratings in 2003; the UEF did not suspect that she may have returned to work until sometime in 2009 or 2010. The UEF has put forth no evidence to suggest that it possesses the powers of prognostication which allowed it to foretell that a justification for denying payment of an impairment award would manifest itself five years later. The UEF cannot refuse to pay otherwise payable benefits on the grounds that at some point in the future, a justifiable reason for refusing to pay those benefits may arise.

¶ 20 Since the UEF has offered no reasonable explanation for its refusal to pay Dostal's impairment awards for her right fibular fracture and cervical spine at the time Dr. Rosen made his assessment, I find the UEF's refusal to pay those awards to be unreasonable.

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²⁶ Emphasis added.

²⁷ I resolved the issue of Dostal's alleged overpayment of TTD benefits in that decision, ¶ 51-57, and therefore do not address the parties' arguments regarding § 39-71-743, MCA.

JUDGMENT

¶ 21 Respondent's motion for reconsideration is **GRANTED**.

¶ 22 Respondent's refusal to pay Petitioner's impairment awards was unreasonable.

DATED in Helena, Montana, this 5th day of November, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: J. Kim Schulke
Leanora O. Coles
Submitted: February 28, 2012